

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel No C-04-2068 VRW
HUANGYAN IMPORT & EXPORT CORP,

 Plaintiff,

 v

NATURE'S FARM PRODUCTS, INC et
al,

 Defendants.

 This is a suit by the United States (the qui tam relator has been dismissed) under the False Claims Act (FCA), 31 USC § 3729 et seq, and the common law against an importer of canned mushrooms and its affiliates. Following various settlements, only the importer, Nature's Farm Products (NFP) and its officers (collectively, the "NFP defendants") remain in this suit. The United States alleges that defendants conspired to and did evade customs duties on their imports by falsifying their products' country of origin. The NFP defendants move pursuant to FRCP 12(b)(6) to dismiss the FCA causes of action for failure to state a

1 claim upon which relief can be granted, advancing purely legal
2 arguments about the reach of the FCA. Doc #13 (motion to dismiss
3 FCA conspiracy claim); Doc #22 (motion to dismiss FCA substantive
4 claim). The court sua sponte raised the question of its subject
5 matter jurisdiction in light of United States v Universal Fruits &
6 Vegetables, 370 F3d 829 (9th Cir 2004). For the reasons that
7 follow, the court concludes that it has jurisdiction over this
8 case, GRANTS the NFP defendants' motion to dismiss the FCA
9 conspiracy claim and DENIES the NFP defendants' motion to dismiss
10 the FCA substantive claim. Finding that this order resolves
11 controlling questions of law as to which there is substantial
12 ground for difference of opinion, and finding that an immediate
13 appeal from this order may materially advance the ultimate
14 termination of this litigation, the court CERTIFIES this order for
15 interlocutory appeal under 28 USC § 1292(b).

I

18 As the motions before the court pose pure questions of
19 statutory interpretation, only the barest recitation of the
20 allegations in the United States' extremely detailed complaint is
21 necessary. "On a motion to dismiss, all well-pleaded allegations
22 of material fact are taken as true and construed in a light most
23 favorable to the non-moving party." Wyler Summit Partnership v
24 Turner Broadcasting System, Inc, 135 F3d 658, 661 (9th Cir 1998)
25 (citing Parks School of Business, Inc v Symington, 51 F3d 1480,
26 1484 (9th Cir 1995)). The operative complaint in this case was
27 filed by the United States in the Southern District of New York on
28 October 10, 2003; the United States simultaneously filed a motion

1 (which was granted) to dismiss the relator under the FCA's public
2 disclosure bar, see 31 USC § 3730(e)(4)(A). Apparently due to a
3 docketing error in the Southern District of New York, the file sent
4 to this court upon transfer under 28 USC § 1404(a) did not include
5 the United States' complaint. To correct the record, the parties
6 have stipulated to the filing of the complaint in this court's
7 docket as Doc #32. Accordingly, what follows is drawn from that
8 complaint (the "complaint"), taking its allegations as true.

9 Defendant NFP is an importer of, inter alia, canned
10 mushrooms. The mushrooms come from Chile, and in late 1998, the
11 International Trade Administration, Department of Commerce (ITA)
12 determined that mushrooms exported from Chile by NFP's Chilean
13 affiliate were being sold at less than fair value ("dumping" in the
14 parlance). ITA imposed an antidumping duty of 148.51% on NFP's
15 mushrooms. See Notice of Final Determination of Sales at Less Than
16 Fair Value: Certain Preserved Mushrooms from Chile, 63 Fed Reg
17 56,613 (ITA Oct 22, 1998). NFP officers Dennis Choi and Peter
18 Pizzo developed a scheme to circumvent the antidumping duties:
19 They would ship large drums of "brined" (salt-preserved) mushrooms
20 from Chile to Canada; in Canada, with the assistance of defendant
21 Ravine Foods, the mushrooms would be de-brined and packaged in cans
22 for retail sale; these cans -- labeled as products of Canada and so
23 designated in paperwork prepared by defendant Aliments Heritage --
24 would be imported from Canada into the United States duty-free
25 pursuant to the North American Free Trade Agreement. Defendant
26 Bank of China, New York Branch (BOCNY) was NFP's commercial bank
27 and was aware of and provided financing for the scheme.

28 Defendants executed the scheme from late 1998 to mid-

1 2000. As each shipment of canned mushrooms was presented at the
2 Canada-United States border, defendants submitted to Customs a
3 Customs Form 7501 that designated the "country of origin" as Canada
4 (or the provinces of Quebec or Ontario), and declared that no duty
5 was owed. Along with the false Forms 7501, defendants submitted
6 false certificates of origin prepared by Aliments Heritage that
7 stated that the mushrooms were products of Canada. In total,
8 between December 9, 1998, and June 9, 2000, NFP imported
9 approximately 150 falsely labeled shipments of Chilean mushrooms
10 with a declared value of approximately \$4.8 million, thus evading
11 antidumping duties of approximately \$7.8 million.

12 A competitor of NFP, relator Huangyan Import & Export
13 ("Huangyan"), uncovered evidence of the scheme during discovery in
14 an apparently unrelated civil lawsuit against NFP. Huangyan filed
15 this qui tam suit against defendants in the Southern District of
16 New York in 2000; the suit was held under seal until 2003 while the
17 United States decided whether to intervene. As noted above, the
18 United States did intervene, filed its own complaint and
19 successfully dismissed the relator. After the United States
20 settled with defendant BOCNY, the case was transferred pursuant to
21 28 USC § 1404(a) to this district (in which NFP has an office). At
22 this point, the United States has settled its claims against all
23 but the NFP defendants.

24 The complaint states four claims: (1) a violation of 31
25 USC § 3729(a)(7) ("§ 3729(a)(7)") the substantive FCA provision for
26 so-called "reverse" false claims (which arise when a party avoids
27 an obligation to pay the government, in contrast to claims that
28 seek fraudulently to obtain money or property from the government);

1 (2) a violation of 31 USC § 3729(a)(3) ("§ 3729(a)(3)"), the FCA's
2 provision governing conspiracies to defraud the government; (3) a
3 claim for common law fraud; and (4) a claim for unjust enrichment.
4 The NFP defendants move pursuant to FRCP 12(b)(6) to dismiss counts
5 (1) and (2) for failure to state a claim upon which relief can be
6 granted.

8 II

9 The court must first consider its own subject matter
10 jurisdiction. See Steel Co v Citizens for a Better Environment,
11 523 US 83, 94 (1998). Generally, the district courts have federal
12 question jurisdiction under 28 USC § 1331 over suits under the FCA.
13 But some matters are carved out from the district courts' original
14 jurisdiction; one such carve-out is found in 28 USC § 1340, which
15 provides that "[t]he district courts shall have original
16 jurisdiction of any civil action arising under any Act of Congress
17 providing for * * * revenue from imports * * * except matters
18 within the jurisdiction of the Court of International Trade." One
19 statute providing for the exclusive jurisdiction of the Court of
20 International Trade is 28 USC § 1582, which vests exclusive
21 jurisdiction in that court of "any civil action which arises out of
22 an import transaction and which is commenced by the United States *
23 * * to recover customs duties."

24 The Ninth Circuit has recently held that an FCA suit
25 brought by the United States in the first instance to recover
26 antidumping duties is within the exclusive jurisdiction of the
27 Court of International Trade because (1) it is a civil action, (2)
28 it is "commenced by the United States," (3) the case "arises out of

1 an import transaction," and (4) the recovery sought constitutes
2 customs duties. United States v Universal Fruits & Vegetables
3 Corp, 370 F3d 829 (9th Cir 2004). Universal Fruits is
4 indistinguishable from the case at bar in all but one respect:
5 Universal Fruits was brought by the United States in the first
6 instance, while the case at bar was originally filed by a relator.
7 This distinction may make a difference, because a suit brought by a
8 relator (who was dismissed) may not be "commenced by the United
9 States" -- thus vesting jurisdiction in this court, not the Court
10 of International Trade. Accordingly, the court must decide whether
11 a FCA suit in which the United States has intervened, filed a
12 complaint and successfully dismissed the qui tam relator is a suit
13 "commenced by the United States" within the meaning of 28 USC §
14 1582 and Universal Fruits. The court put precisely this question
15 to the parties in asking for supplemental briefing, Doc #31, which
16 the parties have provided, Doc #38 (United States), Doc #39 (NFP
17 defendants).

18 The question here is difficult because the case at bar
19 lies between two established markers: On the one hand, in
20 Universal Fruits, the Ninth Circuit held that a suit brought in the
21 first instance by the United States is "commenced by the United
22 States" within the meaning of 28 USC § 1582. On the other hand, in
23 United States ex rel Fenton v Allflex USA, Inc, 989 F Supp 259, 263
24 (CIT 1997), the Court of International Trade held that "a qui tam
25 suit is 'commenced by' the private actor, not the Government." But
26 Fenton is arguably distinguishable from the case at bar because in
27 Fenton the United States had not intervened and the relator was
28 prosecuting the suit; here, by contrast, the United States

1 successfully dismissed the relator (Huangyan) under the public
2 disclosure bar of 31 USC § 3730(e)(4)(A), and filed its own
3 complaint. Because (1) the public disclosure bar of §
4 3730(e)(4)(A) utterly divests courts of jurisdiction over qui tam
5 actions brought on the basis of publicly disclosed information, (2)
6 the United States' complaint supersedes the relator's and (3) the
7 United States is not bound by any action of the relator, see 31 USC
8 § 3730(c)(1), one could fairly argue that the relator's
9 participation was a nullity; that the relator "commenced" this suit
10 only in the sense of docketing the first paper; and that for all
11 practical purposes, the United States "commenced" this suit with
12 its complaint.

13 Against this argument, the United States offers three
14 compelling arguments resting on a detailed textual analysis of the
15 FCA and the Federal Rules of Civil Procedure. First, "a civil
16 action is commenced by filing a complaint with the court." FRCP 3
17 (emphasis added). In some sense, this is the end of the matter:
18 28 USC § 1582 uses the word "commenced" and FRCP 3 defines
19 "commence." Common sense suggests that an activity (e g, a
20 lawsuit) can only be commenced once, and the relator's filing of
21 its complaint in the Southern District of New York was that
22 commencement.

23 Second, within the qui tam provisions of the FCA, 31 USC
24 § 3730, there is a dichotomy between "private persons" (i e,
25 relators) and "the Government": The former may "bring a civil
26 action" that is "brought in the name of the Government"; in the
27 FCA, the relator is referred to as "the person bringing the action"
28 or "the person intiating the action." The United States, by

1 contrast, "may elect to intervene and proceed with the action," and
2 by intervening it assumes "the primary responsibility for
3 prosecuting the action." Among the synonyms for "begin," Roget's
4 Thesaurus lists "commence," "bring" and "initiate." ("Commence"
5 and "proceed" are also both synonyms for "arise," but this cluster,
6 which also includes "derive" and "result," seems to be about
7 genesis -- "arise from," "derive from," "proceed from," "commence
8 from" and so on.) And of course, one cannot "intervene" in
9 something that has not previously commenced. In sum, the relator
10 commences the suit; whatever the United States may later do, it
11 does not also commence the suit.

12 Third, the government points out that there may be
13 significant practical problems with an interpretation that the
14 United States "commences" an FCA suit by dismissing the relator and
15 filing its own complaint. For one thing, such an interpretation
16 would throw into doubt other areas of law that depend on a certain
17 date of commencement, such as the statute of limitations.
18 Moreover, dismissal of the relator would presumably trigger a
19 mandatory transfer of the case to the Court of International Trade
20 (an inconvenient procedure at best); but the dismissal of the
21 relator would be an interlocutory order subject to reconsideration
22 -- and if reversed, the case would (presumably) be retransferred to
23 the district court. This state of affairs could invite the
24 mischief of "jurisdictional ping-pong" that has on occasion
25 required Supreme Court intervention. See Christianson v Colt
26 Industries Operating Group, 486 US 800, 818 (1988). These conundra
27 do not, on their own, compel the conclusion that a district court
28 has jurisdiction over a qui tam FCA suit like this from start to

1 finish, but they lend credence to the notion that Congress did not
2 intend commencement to be a fluid concept.

3 In sum, the United States has the better of the argument
4 on several different levels: An FCA qui tam action in which the
5 relator has been dismissed and the United States has filed a
6 complaint is not "commenced" by the United States within the
7 meaning of 28 USC § 1582. Accordingly, the court concludes that
8 the Court of International Trade would not have subject matter
9 jurisdiction over this action. Therefore, this court has subject
10 matter jurisdiction and proceeds to consider the merits.

11 III

12 In turning to the substantive questions raised in the NFP
13 defendants' motions to dismiss, an overview of the FCA's
14 legislative history is helpful. The FCA was originally enacted
15 during the Civil War and later codified at Rev Stat § 3490 (civil
16 penalties for false claims), which incorporated by reference the
17 substantive offenses of Rev Stat § 5438 (criminal penalties for
18 false claims). Rev Stat § 5438 provided that:

20 any person not in the military * * * who shall
21 make or cause to be made, or present or cause
22 to be presented, for payment or approval, * * *
23 any claim upon or against the Government of the
24 United States * * * knowing such claim to be
25 false, * * * or who enters into any agreement,
26 combination, or conspiracy to defraud the
Government of the United States, or any
department or officer thereof, by obtaining or
aiding to obtain the payment or allowance of
any false or fraudulent claim * * * shall [be
liable to the United States].

27 Aside from recodifications, there have been only two amendments
28 relevant to this case: First, the conspiracy provision was amended

1 by Pub L No 97-258, 96 Stat 978 (1982), to provide simply that
2 "[a]ny person who * * * (3) conspires to defraud the Government by
3 getting a false or fraudulent claim allowed or paid" is liable to
4 the United States. 31 USC § 3729(a). The meaning of "claim" is
5 further clarified in 31 USC § 3729(c).

6 The second amendment to the FCA was in response to a
7 perceived lacuna in the statute: As written, it covered only false
8 claims (i e, affirmative demands on the treasury); it did not
9 clearly reach false statements that avoided an obligation to make a
10 payment to the United States. See United States v Bornstein, 423
11 US 303, 309 n4 (1976) (suggesting in dictum that the pre-1986
12 version of FCA did not reach reverse false claims); United States v
13 Howell, 318 F2d 162 (1963) (holding that the pre-1986 version of
14 FCA did not reach reverse false claims); False Claims Amendments
15 Act of 1986, S Rep No 345, 99th Cong, 2d Sess 15 (1986), 1986
16 USCCAN 5266, 5280 (discussing Department of Justice testimony
17 before Congress that "recent court rulings had produced an
18 ambiguity as to whether * * * 'reverse false claims' were covered
19 by the False Claims Act"). Such claims are "reverse" false claims,
20 because the financial obligation that is the subject of the fraud
21 flows in the opposite of the usual direction.

22 To address this gap, Congress amended the FCA in 1986,
23 see Pub L No 99-562 § 2, 100 Stat 3153 (1986), by adding subsection
24 (7) to 31 USC § 3729(a), which imposes liability on any person who
25 "knowingly makes * * * a false record or statement to conceal,
26 avoid, or decrease an obligation to pay or transmit money or
27 property to the Government." 31 USC § 3729(a)(7).

28 /

A

With this legislative history in mind, the court first considers the NFP defendants' motion to dismiss the substantive FCA claim under § 3729(a)(7). Mot Dismiss (Doc #22). The NFP defendants contend that "a claim under 31 USC § 3729(a)(7) for avoidance of an obligation to pay money to the government[] must be based on a present, existing legal duty to pay the government a fixed sum of money when the alleged false statement is made. * * *

The customs duties, including anti-dumping duties, attach at the time goods (such as mushrooms) are trucked over the border from Canada [which] is at the same time that the alleged false statements or records, namely Customs Form 7501 and the Certificates of Origin were submitted to the United States Customs Service." Def Mot (Doc #22) at 2:4-12. In short, the NFP defendants argue that the "obligation" of § 3729(a)(7) must preexist the "false record or statement" of that subsection.

There being no on-point authority from the Ninth Circuit, the NFP defendants cite out-of-circuit authority for their argument: United States ex rel Bain v Georgia Gulf Corp, 386 F3d 648 (5th Cir 2004) ("Bain"); American Textile Manufacturers Institute, Inc v The Limited, Inc, 190 F3d 729 (6th Cir 1999) ("ATMI"); and United States v Q International Courier, 131 F3d 770 (8th Cir 1997) ("Quick"). The NFP defendants can indeed point to language in each of these opinions that, as a literal matter, supports their position that the "obligation" of § 3729(a)(7) must preexist the "false record or statement. But their argument is sophistry: Each of the cases is factually distinguishable and, more importantly, the reasoning of Bain, ATMI and Quick does not

1 support the result that the NFP defendants would have the court
2 reach in this case.

3 Quick, the oldest of the three cases, concerned a mail
4 courier engaged in a remailing scheme: The courier (Quick) would
5 ship mail in bulk to Barbados, where postage would be paid to
6 Barbados to deliver the letters to destinations in the United
7 States. Because Barbados' international postal rates were
8 significantly lower than United States domestic postal rates, the
9 scheme saved postage costs for Quick's customers. Because the
10 United States Postal Service typically delivers inbound
11 international mail for free under the Universal Postal Convention
12 (in reciprocity with the national postal carriers in foreign
13 states), the Postal Service was not paid for domestic delivery of
14 Quick's letters.

15 The Eighth Circuit began its discussion of the FCA by
16 offering a holding couched in temporal terms: "To recover [for a
17 reverse false claim] under the False Claims Act, we believe that
18 the United States must demonstrate that it was owed a specific,
19 legal obligation at the time that the alleged false record or
20 statement was made, used, or caused to made or used." Quick, 131
21 F3d at 773. The broad strokes of this support the NFP defendants'
22 position. But the court went on to explain its holding in terms of
23 the source of the obligation:

24 The obligation cannot be merely a potential
25 liability; instead, in order to be subject to
26 the penalties of the False Claims Act, a
27 defendant must have had a present duty to pay
28 money or property that was created by a
 statute, regulation, contract, judgment, or
 acknowledgment of indebtedness

Id.

1 From here, the court's discussion makes clear that the
2 emphasis is not so much on the timing of the obligation as on its
3 source. Consistent with this focus, the court worked through the
4 statutory and regulatory sources that might have imposed an
5 obligation on Quick to pay domestic postage as part of its
6 remailing scheme. Finding no source for the "obligation," the
7 Eighth Circuit affirmed the district court's grant of summary
8 judgment. The situation here is rather different, for the United
9 States has identified the source of an obligation to pay duties on
10 certain Chilean mushrooms: the ITA's final order (cited above) and
11 the attendant regulatory framework authorizing and implementing the
12 assessment and collection of such antidumping duties.

13 The Quick court acknowledged that a certain postal
14 regulation might authorize the assessment of a penalty against
15 Quick for encroaching on the Postal Service's statutory monopoly,
16 but promptly explained that "[a] potential penalty, on its own,
17 does not create a common-law debt. A debt, and thus an obligation
18 under the meaning of the False Claims Act, must be for a fixed sum
19 that is immediately due. [The] regulation merely provides a range
20 of penalties that might be assessed; it does not create an
21 immediate duty to pay a specific sum." Id at 774. This court
22 agrees with the Eighth Circuit (and, as will shortly be seen, the
23 Fifth and Sixth Circuits in Bain and ATMI, respectively) that
24 potential obligations -- fines, penalties and the like -- that are
25 contingent upon the exercise of some discretion or intervening act
26 by the government are not properly the subject of a suit under the
27 FCA.

28 The existing debts / contingent penalties dichotomy

frames -- but does not answer -- the relevant question in this case: On which side of the line is the customs duty allegedly owed by the NFP defendants? The United States contends that the legal obligation to pay the antidumping duty existed upon the ITA's issuance of its final order respecting NFP's Chilean mushroom imports, and that "customs officials exercise no discretion at all with respect to antidumping duties, but simply apply the 148.51% established by the [ITA final order] to determine the duties owed. Pl Opp (Doc #23) at 9:22-24 (citing United States v Yuchius Morality Co, 2002 WL 31357050, *3 (CIT)). This argument squarely places the duties at issue in the "existing debts" category -- albeit a subcategory in which payment is contingent upon importation. The NFP defendants do little to dispute the determinacy with which the Customs Service operates; they respond that the duties at issue belong in the "contingent penalties" category because of the contingencies of (1) actual importation and (2) determination by the Customs Service that the mushrooms are in fact covered by the ITA final order. See Def Reply (Doc #25) at 5:15-6:2. The latter is a relevant contingency only if the Customs Service has discretion in designating the origin of an import. But there is no suggestion here that the Customs Service had such discretion. Importation is a contingency in the control of the importer; there is no discretion to be found in the hands of some government official.

This distinction is borne out in the two other courts of appeals decisions relied on by the NFP defendants. Bain concerned alleged violations of state and federal air quality laws by an industrial chemical manufacturer. These violations -- which would

1 have been known to regulatory authorities had the manufacturer not
2 falsified its pollutant reports -- were sufficient to allow those
3 regulatory authorities to assess fines and penalties against the
4 manufacturer. Relator Bain argued that a potential fine or
5 monetary penalty should be interpreted as an "obligation" within
6 the meaning of § 3729(a)(7). 386 F3d at 653-56. The Fifth Circuit
7 rejected this argument:

8 [T]he reverse false claims act does not extend
9 to the potential or contingent obligations to
10 pay the government fines or penalties which
11 have not been levied or assessed (and as to
12 which no formal proceedings to do so have been
13 instituted) and which do not arise out of an
14 economic relationship between the government
15 and the defendant * * *. * * * [Defendant], in
16 common with all others, was obligated to obey
17 the law, including the Clean Air Act and the
18 regulations pursuant thereto, and if it did not
19 it could be subjected (as alleged in the
20 amended complaint) to "statutory fines and
21 penalties", but the mere contingent potential
22 that such fines or penalties might be (but had
23 not been) sought and imposed does not
24 constitute "an obligation to pay or transmit
25 money or property to the Government" within the
26 meaning of section 3729(a)(7).

27 Id at 657-58.

28 Compared to Quick and Bain, the putative obligations in
ATMI are in most respects equally distinguishable from the
obligations in the instant suit. In that case, ATMI contended that
the defendant clothing importers "engaged in a pattern or practice
of trade pursuant to which articles of apparel produced in the
People's Republic of China [were] transhipped to Hong Kong or
Macau; and [were] knowingly represented to be the products of Hong
Kong or Macau in official entry documents [submitted to the Customs
Service] by or on behalf of [the] defendants." ATMI, 190 F3d at
731. Unlike the case at bar, there were no antidumping duties at

1 issue in ATMI, but ATMI did appeal to a number of statutes
2 authorizing penalties for the defendants' alleged practices as
3 establishing an "obligation" under § 3729(a)(7). See ATMI, 190 F3d
4 at 732 (citing 18 USC § 545 (prohibiting smuggling and false
5 customs documents); 19 USC § 1595a(b) (penalizing importation of
6 goods "contrary to law"); 19 USC § 1592 (penalizing false
7 statements in connection with importation); 19 USC § 1623 (relating
8 to customs bonds); 19 USC § 1304(h) (imposing a 10% duty on goods
9 bearing false country-of-origin markings); 15 USC §§ 45(n), 70a(a),
10 70b(b)(4) (deeming misbranding of textiles to be unfair
11 competition)).

12 The ATMI court adopted the reasoning of the Eighth
13 Circuit in Quick. 190 F3d at 736. Based on this, it was easy to
14 reject most of the putative obligations as "rely[ing] on the theory
15 of contingent obligations" because they depended on the exercise of
16 governmental discretion to seek a fine or penalty, or, in the case
17 of the bonding requirement, were contingent upon the government
18 requiring a bond in the first instance, which it had not. *Id* at
19 741. Indeed, the provision penalizing the making of false
20 statements to the Customs Service, 19 USC § 1592, seems an
21 especially inappropriate basis for a suit under the FCA because not
22 only is the penalty contingent on government enforcement, but also
23 liability only arises because of the false statement itself.

24 For the ATMI court, the allegation that "the defendants
25 filed false documents to conceal liability under 19 USC § 1304(h)
26 present[ed] the most difficulty, as it involves a provision
27 applying a ten percent ad valorem marking duty to goods having
28 false country-of-origin markings." 190 F3d at 741. In other

1 words, the United States will permit the importation of mismarked
2 goods (subject to other penalties, perhaps) upon payment of an
3 additional 10% ad valorem duty (the "mismarking duty"). This seems
4 at first blush legally indistinguishable from the case at bar: In
5 ATMI the defendants allegedly lied about the country of origin to
6 conceal their obligation to pay a readily computable sum (i e, 10%
7 of the value of the imported textiles); here, the NFP defendants
8 allegedly lied about the country of origin to conceal their
9 obligation to pay a readily computable sum (i e, 148.51% of the
10 value of the imported mushrooms). The NFP defendants correctly
11 point out that the ATMI court adopted their view in rejecting the
12 position that the mismarking duty is an "obligation" within the
13 meaning of § 3729(a)(7).

14 The court is not entirely confident that it comprehends
15 the Sixth Circuit's reasoning in ATMI, but it seems to rest on
16 three related aspects of the mismarking duty: First, the ATMI
17 court noted that the mismarking duty applies "when a defendant
18 engages in conduct that the statute defines as wrongful." 190 F3d
19 at 741 (emphasis added). Second, ATMI depends very heavily on a
20 Federal Circuit case interpreting the mismarking duty provision to
21 require a mens rea. See ATMI, 190 F3d at 741-42 (quoting Pentax
22 Corp v Robison, 125 F3d 1457, 1463 (Fed Cir 1997). Third, ATMI
23 pointedly quotes Pentax's note that mismarking duties arise not at
24 the time of mismarking, but rather upon the would-be importer's
25 subsequent "failure to export, destroy, or remark the articles in
26 accordance with [the law]." ATMI 190 F3d at 741-42 (quoting
27 Pentax, 125 F3d at 1463).

28 The court is unsure why the labeling of conduct as

1 "wrongful" or attaching a mens rea requirement are relevant to
2 whether a customs duty can be the subject of an FCA claim, but in
3 any event, neither aspect is present for the antidumping duties
4 here at issue: The antidumping duty is not assessed because
5 importation is "wrongful"; it is simply the price of bringing
6 certain products into the United States. As for the mens rea
7 requirement, there is apparently no analogue to Pentax in the
8 antidumping duty context, and there is no independent suggestion by
9 the parties that a mens rea requirement attaches to the antidumping
10 duties. Finally, Pentax's comment about the importer's "failure to
11 export, destroy, or remark" has no parallel here. The importer of
12 goods subject to antidumping duties has no opportunity to remedy
13 his false statement in the way that an importer of mismarked goods
14 can subsequently re-mark the goods. Indeed, there is no way at all
15 to "cure" the fact that the mushrooms come from Chile; a mismarked
16 product can be re-marked, but Chilean mushrooms will always be
17 Chilean. Facing such distinctions, the court will not follow ATMI
18 on this issue.

19 This leaves the court with the simple dichotomy
20 identified above: There are obligations that are certain (or
21 nondiscretionary and readily computable) and there are fines and
22 penalties contingent on governmental discretion, and the putative
23 obligation in this case falls in the former category. Accordingly,
24 because the NFP defendants have failed to explain what was
25 contingent or discretionary about the assessment of the antidumping
26 duties alleged in the complaint, their motion to dismiss the first
27 claim (Doc #22) is DENIED.

28 /

B

The court next takes up the NFP defendants' motion to dismiss the FCA conspiracy claim under § 3729(a)(3). Mot Dismiss (Doc #13). Section 3729(a)(3) holds liable persons who "conspire to defraud the Government by getting a false or fraudulent claim allowed or paid." The NFP defendants' argument is a simple syllogism: By its express terms, § 3729(a)(3) does not reach conspiracies to make reverse false claims. The complaint describes a reverse false claim conspiracy -- specifically, a plan to avoid paying customs duties. Ergo § 3729(a)(3) does not reach the conspiracy described in the complaint.

Admittedly, this creates an unusual lack of symmetry in the FCA's structure: Normal and reverse false claims are equally punishable as a substantive matter, but only conspiracies directed at the former, not the latter, are punishable. But the NFP defendants' logic is unassailable. As this court has previously explained in interpreting another provision of the FCA:

Courts engaged in statutory interpretation should presume that "if the language of a statute is clear and there is no ambiguity, then there is no need to 'interpret' the statute by resorting to legislative history." Church of Scientology v United States Dep't of Justice, 612 F2d 417, 421 (9th Cir 1979). The reasoning behind this so-called "plain meaning rule" is that "in the vast majority of its legislation Congress means what it says and thus the statutory language is normally the best evidence of congressional intent." *Id.*

United States ex rel Costa v Baker & Taylor, Inc, 1998 WL 230979, *7 (ND Cal) (Walker, J). The requirement that the conspiracy be directed at "getting a false or fraudulent claim allowed or paid," § 3729(a)(3) is unambiguous: Its plain meaning requires that the

1 conspirators seek to be "paid" or to have a claim on the treasury
2 "allowed." That is not what allegedly happened here; the alleged
3 conspirators in this case wanted to avoid paying money to the
4 United States.

5 Nor is the definition of "claim" in § 3729(c) any help to
6 the United States. That section -- which merely expands the scope
7 of "claim" to include claims made on agents or intermediaries of
8 the United States -- does nothing to sweep reverse false claims
9 within the meaning of "claim":

10 For purposes of this section, "claim" includes
11 any request or demand, whether under a contract
12 or otherwise, for money or property which is
13 made to a contractor, grantee, or other
14 recipient if the United States Government
15 provides any portion of the money or property
which is requested or demanded, or if the
Government will reimburse such contractor,
grantee, or other recipient for any portion of
the money or property which is requested or
demanded.

16 31 USC § 3729(c). Thus, neither in the pertinent subsection
17 itself, nor in the statute's definitions is there any way to
18 shoehorn reverse false claim conspiracies into § 3729(a)(3).

19 Moreover, the court is mindful that (1) the Ninth Circuit
20 interpreted the pre-1986 FCA not to reach reverse false claims, see
21 Howell, 318 F2d 162; (2) the conspiracy provision, § 3729(a)(3),
22 has not been meaningfully altered since Howell; and (3) the
23 conspiracy provision was untouched by the 1986 amendments made by a
24 Congress quite aware of the distinction between normal and reverse
25 false claims. In that light, Howell is arguably still good law
26 with respect to § 3729(a)(3), and this court is obliged to conclude
27 that § 3729(a)(3) does not reach conspiracies to make reverse false
28 claims. This interpretation is in accord with the only other

1 federal case squarely to address this issue. See United States ex
2 rel Atkinson v Pennsylvania Shipbuilding Co, 255 F Supp 2d 351,
3 413-14 (ED Pa 2002).

4 The United States's opposition (Doc #19) largely misses
5 the point of the NFP defendants' motion regarding the conspiracy
6 claim. For example, the United States contends that the "obvious
7 problem with the argument of the NFP Defendants that a conspiracy
8 to submit a reverse false claim requires 'actual payment' is that
9 reverse false claims, by their nature, do not involve an 'actual
10 payment.'" Pl Opp (Doc #19) at 9:26-10:1 (emphasis added). But
11 the NFP defendants' argument is that § 3729(a)(3) requires actual
12 payment (or a demand seeking actual payment), and thus does not
13 reach reverse false claims -- which, indeed, do not involve actual
14 payment. Moreover, the United States pays disturbingly little
15 attention to the wording of the subsections of § 3729(a) when it
16 argues:

17 The NFP Defendants also argue that the
18 definition of "claim" in § 3729(c) precludes
19 liability for anything other than a demand for
20 money or property. Yet if this argument were
21 true, there would never be any liability for
22 reverse false claims, which by their nature do
23 not involve a demand for money or property. By
24 this interpretation, "reverse false claims" are
25 not "claims" at all. The NFP Defendants cannot
26 interpret one provision of the False Claims Act
27 (§ 3729(c)) to render a separate provision (§
28 3729(a)(7)) a nullity.

24 Pl Opp (Doc #19) at 15:3-8. The argument is that subsection (a)(7)
25 -- the provision of the FCA that indisputably reaches reverse false
26 claims -- relies on "claim" including reverse false claims, and
27 therefore "claim" elsewhere in the statute must include reverse
28 false claims. But the premise of the argument is demonstrably

1 false: Nowhere in its thirty-two words does subsection (a)(7)
2 refer to "claims." The government could not have put it better:
3 "'reverse false claims' are not 'claims' at all." Pl Opp (Doc #19)
4 at 15:6-7.

5 The United States also spends a great deal of effort
6 attempting to persuade the court that failing to impose liability
7 on a reverse false claim conspiracy is at odds with its drafters'
8 intent. The resort to legislative history is inappropriate and
9 unavailing. As an initial matter, "to disregard the plain meaning
10 of [a] statute," a court must first "conclude that the result [of a
11 plain meaning reading" is either absurd or would lead to internal
12 inconsistency." Coronado-Durazo v INS, 123 F3d 1322 (9th Cir 1997)
13 (citing United States v Turkette, 452 US 576, 580 (1981)). While
14 the court is sympathetic to the United States' commonsense point
15 that there is very little difference in economic terms between
16 conspiring to make a false claim on the United States and
17 conspiring to avoid paying money to the United States, this result
18 is not self-contradictory and it is hardly "absurd". After all,
19 the FCA did not cover reverse claims at all for the first 123 years
20 of its existence; while that might have been bad policy, surely it
21 was not absurd. Even if resort to legislative history were
22 permissible here, the United States appeals to Congress' intent in
23 enacting § 3729(a)(7) -- which is not at issue here. The
24 legislative history of subsection (a)(7) can hardly change the
25 meaning of the previously enacted subsection (a)(3). The short of
26 it is that if Congress in 1986 wanted to include reverse false
27 claim conspiracies in the FCA, it failed to enact any statutory
28 language to that effect. It is not up to this court to do what

1 candidly acknowledges its partial disagreement with the Sixth
2 Circuit's decision in ATMI, so reasonable jurists might not reach
3 the conclusions that has this court. These issues go to the heart
4 of the case: Depending on how the three issues are resolved, the
5 United States might have two FCA claims, one FCA claim, no claim at
6 all or might be in the wrong court altogether. This order itself
7 is a "split decision" on the merits issues. Furthermore, the
8 stakes are large -- after trebling and civil penalties, there are
9 tens of millions of dollars in controversy. And while the United
10 States maintains that it will require relatively little further
11 discovery, the NFP defendants represent that they anticipate taking
12 discovery outside of the United States, a sometimes onerous task.

13 For these reasons, the court is of the opinion that
14 certification of this order for interlocutory appeal under 28 USC §
15 1292(b) is appropriate: It involves three controlling questions of
16 law as to which there are substantial grounds for difference of
17 opinion, and immediate appellate review of those questions may
18 materially advance the termination of the litigation (whether by
19 dismissal, compromise or transfer for want of jurisdiction).
20 Accordingly, this order is CERTIFIED for interlocutory appeal. As
21 this order resolves issues against both parties, either party may
22 apply to the Court of Appeals for the Ninth Circuit to accept
23 certification. Should the Ninth Circuit accept certification, the
24 parties shall confer and within 30 days submit to the court a
25 proposal for whether this action should be stayed pursuant to the
26 proviso of 28 USC § 1292(b). In the event the Ninth Circuit
27 declines to accept certification, the parties are directed to so
28 inform the court promptly and request a case management conference.

IV

In sum, the court GRANTS the NFP defendants' motion to dismiss the FCA conspiracy claim (Doc #13) and DENIES the NFP defendants' motion to dismiss the FCA substantive claim (Doc #22). This order is CERTIFIED for interlocutory appeal pursuant to 28 USC § 1292(b) .

IT IS SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge